expected of the specialist.[2] The third, and now widely accepted view is that there are no degrees of negligence, but that negligence is absolute, namely, a lack of that care which the ordinary reasonable man would use under the circumstances.[3] The third view seems the most satisfactory. The needlessness of the distinction made in the second theory may be illustrated as follows. If an unskilled man undertakes to run a locomotive, he is held to the same standard of care as a skilled engineer, for his negligence consists largely in his trying at all. If, on the other hand, he volunteers in a case of necessity, when no expert is at hand, the degree of care required of him will be less under the altered circumstances; but negligence remains the same, that is, a failure to exercise the degree of care required. Degrees of care undoubtedly exist. Yet, when a man has failed to use the required care, the amount by which he falls short of the standard is altogether immaterial.

It is true that many courts, still recognizing degrees of negligence, apply the term "gross negligence" to something which should be classed rather as a species of wilful misconduct than as negligence.[4] An act done with a consciousness of probable results and reckless indifference to them contains another element beside the mere inadvertence characteristic of negligence. This may be well illustrated in the difference between the case of a locomotive engineer who accidentally falls asleep while running his train at high speed through a crowded city, and the case where he runs his train in the same way under these conditions when awake and conscious of the probability of accident. The former would be called "gross negligence" under the old rule; the latter is often named "gross negligence," but should be called "wantonness." Wantonness cannot involve actual intent to do the injury; yet it is clearly something different from negligence, which is mere inadvertence. Courts almost universally hold that contributory negligence of the plaintiff is no defense for "wantonness."[5] The moment the more serious element of wilfulness enters, negligence is disregarded as a factor in the result. A recent Wisconsin decision recognized the distinction between wantonness and negligence by holding a verdict inconsistent which found that a death was produced by both the ordinary negligence of the defendant and also his "gross negligence," a term which the court unfortunately use in the sense of wantonness. *Rideout* v. *Traction Co.*, 101 N. W. Rep. 672. In fact, the elements of consciousness of the result and complete indifference as to injury place wantonness in a separate class between negligent and intentional torts. Wantonness is as reprehensible as intentional wrongdoing and should be classed with it.

THE LAST CHANCE RULE IN ADMIRALTY. — The consequences of contributory negligence at common law and in admiralty are different: at common law the plaintiff is barred; in admiralty the damages are divided. But do both systems adopt the same definition of contributory negligence? Is

---

[2] 1 Beven, Negligence, 2d ed., 20 ff.

[3] Milwaukee, etc., R. Co. *v.* Arms, 91 U. S. 489. See Steamboat New World *v.* King, 16 How. (U. S.) 469.

[4] Bolin *v.* Chicago, etc., R. Co., 108 Wis. 333.

[5] Central R. R. Co. *v.* Newman, 94 Ga. 560. See Palmer *v.* Chicago, etc., R. R. Co., 112 Ind. 250.

the rule of the last clear chance, as it has been evolved from the famous case of Davies *v.* Mann,[1] law on the water? England has decisively answered in the affirmative.[2] Singularly enough, in this country the question seems to have been considered for the first time only yesterday. *The Steam Dredge No.* 1, 134 Fed. Rep. 161 (C. C. A., First Circ.). The court in an elaborate *dictum*, answered it as decisively in the negative.

In its last analysis, the problem of contributory negligence is the problem of legal, or, as it is commonly expressed, of "proximate" cause. For it is to be observed that proximate, in its legal usage, defines nothing. That which the law regards as an efficient cause it terms proximate. What, then, is the nature of that negligence which the law declares to be a proximate cause when it asserts that he who neglects the last clear chance to avoid an injury must bear the loss? As the rule is ordinarily stated, it might well seem that proximate means simply proximity in time.[3] Against such a statement of the rule it is not strange that the text-writers have protested.[4] The fact that A's negligence precedes B's in time is not of itself significant. But when B's wrong takes the form of a negligent disregard of the conditions created by A's negligence, B's negligence may properly be regarded as the proximate cause, and B be compelled to stand the loss.[5] For, to regard A's negligence as a proximate cause — and hence contributory — would be to deny to a negligent person, except against wilful misconduct, the right to immunity from being harmed by others. And, practically, however baldly the courts state the rule, it is with some such qualification that they apply it.[6] As thus defined, moreover, A's negligence is strictly, in any legal sense, not contributory; and the rule of the last clear chance, accordingly, does not, as is frequently said,[7] state an exception to the doctrine of contributory negligence, but serves to determine what negligence is not contributory.

Should admiralty, then, adopt a different definition of legal cause from that of the common law? Lord Blackburn's answer[8] seems conclusive. Two vessels in a stream and two carts in a street should, in this respect, be governed by the same rules. The soundness, therefore, of the views in the principal case would seem to depend on whether they are to be taken as repudiating the last chance rule *in toto*, or only that statement of it which makes priority in time the test. The former is apparently the intention of the court; for it expressly denies the relevancy of knowledge on B's part of the situation which A's negligence has created. It is, however, a striking circumstance that not one of the cases cited bears the court out on this point; for either the colliding vessel was not aware of the presence of the other,[9] or both vessels were aware of each other, and both continued negligently on their courses until too late to avoid the collision.[10] Though no cases have

---

[1] 10 M. & W. 546.
[2] Cayzer *v.* Carron Co., 9 App. Cas. 873.
[3] See Nashua Iron & Steel Co. *v.* Worcester, etc., R. R. Co., 62 N. H. 159, 165.
[4] Beach, Contrib. Neg. § 11.
[5] This qualification of the bald rule is substantially that suggested in 2 Thompson, Contrib. Neg. 1175 n.
[6] See O'Keefe *v.* Chicago, etc., R. R., 32 Ia. 467; 2 Thompson, Neg. 1157 n. and cases cited.
[7] See Grand Trunk R. R. *v.* Ives, 144 U. S. 408, 429.
[8] See Cayzer *v.* Carron Co., *supra*.
[9] The James D. Leary, 110 Fed. Rep. 685; The Providence, 98 Fed. Rep. 133; Atlee *v.* Packet Co., 21 Wall. (U. S.) 389 (collision with a sunken pier); The James Gray, 21 How. (U. S.) 184.
[10] The America, 92 U. S. 432; The New York, 175 U. S. 187.

been found in which the question was expressly argued, the result reached in two cases not cited tend, on the facts as found in them, to support the view in the principal case.[11]

RECENT CASES.

BAIL — LIABILITY TO ANSWER CHARGES NOT NAMED IN BOND. — The defendant was surety on a bail bond reciting a charge of homicide and conditioned that the prisoner "appear and answer the charge above mentioned in whatever court it may be prosecuted, and shall at all times render himself amenable to the orders and process of the court." The grand jury dismissed the charge of homicide, but found an indictment for perjury. Upon the prisoner's failure to appear and plead to the indictment for the latter offense, the recognizance was forfeited. *Held*, that the defendant's motion to set aside the judgment of forfeiture should be denied, since, under the bond, the prisoner is bound to answer all charges whether for the same or different crimes. Two justices dissented. *Pernetti* v. *People*, 91 N. Y. Supp. 210.

This decision overrules an expression of the court upon a former appeal of the case, but conforms to strong *dicta* announced in former New York opinions. *Cf. People* v. *Pernetti*, 95 N. Y. App. Div. 510; *People* v. *Gillman*, 125 N. Y. 372. Upon the theory that bail is imprisonment in the custody of the sureties instead of in that of the jailer, and reference to the criminal charge, merely description of its occasion, there seems no escape from the court's conclusion. Since the precise nature of the crime may not be known upon arrest, it is most desirable to hold the prisoner for any indictments based on the criminal act charged, but, in spite of sweeping language, it is believed the decisions rarely go farther. *Cf. State* v. *Ridding*, 8 La. An. 79; *Gresham* v. *State*, 48 Ala. 625. The prevailing tendency is to construe the language of recognizances as applying strictly to appearance for the criminal act charged, or a crime growing therefrom. *State* v. *Brown*, 16 Ia. 314. The greater difficulty in obtaining sureties to be responsible for all charges, whether arising from the prisoner's prior or subsequent conduct, would seem to make this view more nearly in harmony with the humane object of bail.

BAILMENTS — GRATUITOUS BAILMENTS — NATURE AND EXTENT OF LIABILITY OF GRATUITOUS BAILEE. — The defendants gratuitously undertook to pass certain goods of the plaintiffs through the customs. Owing to the defendants' delay, the goods were not entered until after an anticipated change in the tariff rates, whereby the plaintiffs were obliged to pay a heavy duty, for which they now seek reimbursement. *Held*, that the defendants are not liable. *Commonwealth, etc., Co.* v. *Weber, etc., Co.*, 91 L. T. R. 813 (Eng. P. C.).

For a discussion of the principles involved, see 17 HARV. L. REV. 126.

BILLS AND NOTES — DOCTRINE OF PRICE *v.* NEAL — RECOVERY BY DRAWEE PAYING A FORGED DRAFT. — The plaintiff agreed to accept W.'s drafts for the price of cattle, if bills of sale signed by the vendor of the cattle should appear on the backs of the drafts. W. drew several drafts on the plaintiff, payable to a cattle dealer, wrote bills of sale on the backs, forged the cattle dealer's name, as vendor to the bills of sale, and as indorser to the drafts, and finally discounted these drafts at a bank which had no notice of any irregularity. The bank obtained acceptance and payment from the plaintiff. *Held*, that the money so paid may be recovered. *Lafayette & Bro.* v. *Merchants' Bank of Fort Smith*, 84 S. W. Rep. 700 (Ark.).

For a discussion of the principles involved, see 4 HARV. L. REV. 297.

BURDEN OF PROOF — QUANTUM OF PROOF IN CIVIL ACTIONS BASED ON A CRIME. — In a civil action for a felonious assault the defendant requested a ruling to the effect that the plaintiff must prove his case beyond a reasonable doubt. *Held*, that the request is properly denied. *Kurz* v. *Doerr*, 180 N. Y. 88.

This affirms the decision in the Appellate Division, commented upon in 17 HARV. L. REV. 198.

---

[11] The Milligan, 12 Fed. Rep. 338; The Pegasus, 19 Fed. Rep. 46. See also conflicting *dicta* in The Daylesford, 30 Fed. Rep. 633; The Richmond, 63 Fed. Rep. 1020.